

FEDERAL COURT OF AUSTRALIA

Patel v Minister for Immigration and Border Protection [2015] FCAFC 22

Citation: Patel v Minister for Immigration and Border Protection [2015] FCAFC 22

Appeal from: Patel & Ors v Minister for Immigration & Anor [2014] FCCA 2059

Parties: **JASMINA HARSHADBHAI PATEL, PIYUSHKUMAR KASHIRAM PATEL and SHAILY PIYUSHKUMAR PATEL v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and MIGRATION REVIEW TRIBUNAL**

File number: NSD 1000 of 2014

Judges: **EDMONDS, BUCHANAN & FLICK JJ**

Date of judgment: 3 March 2015

Catchwords: **MIGRATION** — appeal from Federal Circuit Court of Australia – where appellant submitted a test form purporting to show English language proficiency – where verification of test form showed it to incorrectly record testing scores – where applicant denied intentionally providing false test form – whether test form was a bogus document – whether Migration Review Tribunal (“MRT”) correctly applied Public Interest Criterion 4020 for the purposes of *Migration Regulations 1994* (Cth), Sch 2 cl 885.224 – whether MRT required to make own inquiries about the authenticity of the test form

Legislation: *Migration Act 1958* (Cth), ss 97, 103, 348, 394, 352(4), 487ZI, 487ZJ
Migration Regulations 1994 (Cth), rr 1.03, 2.41, 5.15, Sch 2 cl 885.224, Sch 4 item 4020

Cases cited: *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1276
Khant v Minister for Immigration and Citizenship [2009] FCA 1247, (2009) 112 ALD 241
Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333
Minister for Immigration and Citizenship v SZIAI [2009]

HCA 39, (2009) 259 ALR 429, (2009) 83 ALJR 1123

Trivedi v Minister for Immigration and Border Protection
[2014] FCAFC 42, (2014) 220 FCR 169

Date of hearing:	18 February 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	49
Counsel for the Appellant:	Mr L Karp
Solicitor for the Appellant:	Parish Patience Immigration Lawyers
Counsel for the First Respondent:	Mr G Johnson SC with Mr T Reilly
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent submitted save as to costs

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1000 of 2014

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: JASMINA HARSHADBHAI PATEL
First Appellant**

**PIYUSHKUMAR KASHIRAM PATEL
Second Appellant**

**SHAILY PIYUSHKUMAR PATEL
Third Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: EDMONDS, BUCHANAN & FLICK JJ

DATE OF ORDER: 3 MARCH 2015

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. 1. Leave is granted to amend the *Notice of Appeal* in accordance with the form of the *Amended Notice of Appeal* dated 18 February 2015.
2. 2. The appeal is dismissed.
3. 3. The Appellant is to pay the costs of the First Respondent.
- 4.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1000 of 2014

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: JASMINA HARSHADBHAI PATEL
First Appellant**

**PIYUSHKUMAR KASHIRAM PATEL
Second Appellant**

**SHAILY PIYUSHKUMAR PATEL
Third Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: EDMONDS, BUCHANAN & FLICK JJ

DATE: 3 MARCH 2015

PLACE: SYDNEY

REASONS FOR JUDGMENT

EDMONDS J:

1 1 I have had the advantage of reading in draft the separate reasons and
conclusions of Buchanan J and Flick J. I agree with the reasons of both and the orders
proposed by Flick J.

I certify that the preceding one (1)
numbered paragraph is a true copy
of the Reasons for Judgment herein
of the Honourable Justice Edmonds.

Associate:

Dated: 3 March 2015

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1000 of 2014

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: JASMINA HARSHADBHAI PATEL
First Appellant**

**PIYUSHKUMAR KASHIRAM PATEL
Second Appellant**

**SHAILY PIYUSHKUMAR PATEL
Third Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: EDMONDS, BUCHANAN & FLICK JJ

DATE: 3 MARCH 2015

PLACE: SYDNEY

REASONS FOR JUDGMENT

BUCHANAN J:

2 2 The appellant is a citizen of India. On 18 December 2009 she applied for a
Skilled (Residence) (Class VB) visa.

3 3 To satisfy the requirements of the visa the appellant was obliged to have
competent English. That required (relevantly here) an IELTS (International English
Language Testing System) score of at least 6 for each of four test components of speaking,
reading, writing and listening.

Another requirement for the grant of the visa was that the appellant met Public Interest Criterion (PIC 4020) (cl 885.224 of Sch 2 to the *Migration Regulations 1994* (Cth) as it then applied).

PIC 4020 required consideration of the following matters:

- Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular; and
- If so, should the requirements of PIC 4020 be waived.

Section 97 of the *Migration Act 1958* (Cth) (“the Act”) defines bogus document as follows:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

In *Trivedi v Minister for Immigration and Border Protection* (2014) 220 FCR 169 (“*Trivedi*”), a Full Court decided that “an element of fraud or deception is necessary in order to attract the operation of PIC 4020” (see at [33]) and “that PIC 4020 is directed to information or documents which are purposely untrue” (see at [49]). It was also held that it was not necessary, in order to engage the operation of PIC 4020, that a visa applicant “was knowing or complicit in the deceptive character of the information ... furnished” (see at [43], [45], [50], [52]).

In a decision given on 5 April 2013 (before *Trivedi* was decided), a delegate of the Minister refused to grant the appellant a visa because the delegate was not satisfied that the appellant met PIC 4020. The delegate found that the appellant had provided a bogus IELTS test report form.

The appellant provided an IELTS test report form with her application for a visa which showed that her results for listening, reading, writing and speaking were, respectively, 7, 7, 7.5 and 7. The test in question was undertaken on 31 January 2009. The appellant also provided the “test reference number” in her application. There is an IELTS

online verification system which is used to confirm results of this kind. That system showed that the appellant received the following results in the test conducted on 31 January 2009 for listening, reading, writing and speaking: 4.5, 4, 4.5 and 4.

10 10 Before she made her decision, the delegate drew the discrepancy to the appellant's attention and asked for her comments, informing her clearly of the requirements and significance of PIC 4020. The appellant's response was contained in a Statutory Declaration which said (relevantly):

3. I would like to assure the Department that the IELTS test results I provided were the results I obtained from the testing authority and were not in any way altered or forged by me prior to submission to the Department. They were presented to the Department as given to me.

11 11 The denials contained in this paragraph are limited. They do not suffice to fully address the issue. The delegate, as I have said, concluded that the document provided was a bogus document.

12 12 After refusal of the visa application, the appellant applied to the Migration Review Tribunal ("the MRT") for review of the delegate's decision. The question of the reliability of the IELTS test report was obviously a central issue. On 27 September 2013 (also before the judgment in *Trivedi*), the MRT affirmed the delegate's decision. The MRT also concluded that the IELTS test report form provided by the appellant with her application for a visa was a bogus document. The MRT noted that the definition of bogus document is satisfied in the event of a reasonable suspicion about the character of a document.

13 13 The appellant's position was that she was not responsible for any alteration or forgery of the document which she supplied but, as the MRT correctly appreciated, that was not the test to be applied. Before and during the course of the hearing before the MRT, the MRT provided to the appellant for her comparison and answer the test report form provided by her and the report of the online verification system showing that both recorded the same test date, unique identification numbers and the same photograph of the appellant. The appellant was unable to provide an explanation beyond saying that she was not responsible for any lack of conformity between the two. The MRT concluded, on this issue:

22. The Tribunal finds that the applicant had given with her application the results of an IELTS test completed on 31 January 2009, which show she had achieved the score of at least 7 in each test component. Having regard to the results of that test shown on the IELTS verification system, the Tribunal

reasonably suspects that the test report provided by the applicant with the application was a bogus document either because it purports to have been, but was not, issued in respect of the applicant, or because it is counterfeit or has been altered by a person who does not have authority to do so. The Tribunal finds that there is evidence that the applicant had given, or caused to be given, to the Minister or an officer, a bogus document and such document was given in relation to the application for the visa (for the purpose of meeting the competent English requirement in cl. 885.213). The Tribunal finds that the applicant does not meet PIC 4020(1).

14 14 The MRT then considered whether the requirements of PIC 4020 should be waived in the appellant's case. It recorded:

23. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen as defined in r.1.03.

15 15 The MRT considered the limited material advanced by the appellant to suggest that there were compassionate or compelling circumstances in her case but concluded:

28. On the very limited evidence before it, the Tribunal is not satisfied that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the granting of the visa. The Tribunal determines that the requirements of PIC 4020(1) should not be waived.

16 16 The MRT also considered a request that it delay the hearing to allow the appellant to sit another IELTS test booked for 26 October 2013 but recorded that it had decided to proceed, for the following reasons:

29. The applicant requested the Tribunal to await the outcome of a further IELTS test. She gave to the Tribunal evidence of having made a booking in August 2013 for a test on 26 October 2013. The Tribunal has considered the request but decided not to grant the applicant more time to do the test because the applicant's English proficiency is not at issue. Having found that the applicant had given, or caused to be given, a bogus document, the Tribunal finds that PIC 4020 would apply, even if the applicant were able to show competent English through undertaking another test (see *Mudiyanselage v MIAC* [2013] FCA 266). For the reasons stated above, the Tribunal does not consider that achieving any particular score in October 2013 would provide probative evidence of the applicant's English proficiency in January 2009 such as to cast doubt on the accuracy of the test results recorded on the IELTS verification system.

17 17 After the affirmation by the MRT of the delegate's decision, the appellant applied for judicial review of the MRT's decision to the Federal Circuit Court of Australia ("the FCCA"). On 11 September 2014, the application for judicial review was dismissed (*Patel & Ors v Minister for Immigration & Anor* [2014] FCCA 2059). The application for judicial review was dismissed for the essential reason that no jurisdictional error had been shown in relation to the decision or proceedings of the MRT. In particular, the FCCA rejected a submission that the approach taken by the MRT was inconsistent with the tests distilled by the Full Court in *Trivedi*.

18 18 An appeal was then brought to this Court. The amended grounds of appeal are:

1. The Court Below erred in finding that the second respondent (the Tribunal) had correctly construed and applied the criterion in item 4020 of Schedule 4 to the Migration Regulations 1994 (PIC 4020).
2. The Court Below should have found that the Tribunal erred in:
 - (a) Failing to appreciate the requirements of evidence or information necessary before PIC 4020 could be invoked.
 - (b) Misapplying PIC 4020.
3. The Federal Circuit Court erred in finding that it was necessary for the appellants to demonstrate that a fact which they claimed the Tribunal should have inquired about actually existed. The purpose of the inquiry would have been to establish whether the fact existed or not.

19 19 In my respectful view, none of those grounds of appeal has any substance. Having regard to the circumstances which I have described, it is clear that the MRT gave direct consideration to whether the document was a bogus document within the meaning of s 97 of the Act and whether PIC 4020 was engaged in relation to it. There was no error in that analysis, whether by reference to the judgment of this Court in *Trivedi* or otherwise which discloses jurisdictional error.

20 20 The suggested obligation that the MRT should itself have pursued further inquiries cannot be sustained either. The failure of the MRT to make its own further inquiries does not reveal jurisdictional error in this case.

21 21 In *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, the High Court rejected the notion of a freestanding obligation to inquire and emphasised that the

central question always remained whether the Tribunal had faithfully carried out its review function, saying (at [25]):

[25] Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a “duty to inquire”, that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case. ...

(Footnote omitted.)

22 22 There is no substance in any suggestion that the MRT failed to carry out its review function, or address itself to the issues for decision.

23 23 It might finally be noticed that, even if the MRT had not acted upon its conclusion that PIC 4020 was not satisfied as a criterion for the grant of a visa, the MRT would have been bound at the date of its decision to refuse a visa in any event. On its clear findings, the appellant did not satisfy the visa criterion for competent English. The MRT was under no obligation to wait upon a further attempt to satisfy that criterion which had not been satisfied at the time of application, the time when the delegate made the decision under review, or the time when the MRT was in a position to make a decision.

24 24 I would dismiss the appeal with costs. I agree with the orders proposed by Flick J.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 3 March 2015

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1000 of 20014

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: JASMINA HARSHADBHAI PATEL
First Appellant**

**PIYUSHKUMAR KASHIRAM PATEL
Second Appellant**

**SHAILY PIYUSHKUMAR PATEL
Third Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: EDMONDS, BUCHANAN & FLICK JJ

DATE: 3 MARCH 2015

PLACE: SYDNEY

REASONS FOR JUDGMENT

FLICK J

25 25 The present appeal focusses attention, yet again, on the correct interpretation
and application of the phrase “*bogus document*” as defined in s 97 of the *Migration Act 1958*
(Cth) (“the Act”).

26 26 That definition provides as follows:

bogus document, in relation to a person, means a document that the Minister reasonably
suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

The phrase “*bogus document*” is thereafter invoked in both the Act (ss 103, 487ZI, 487ZJ) and the *Migration Regulations 1994* (Cth) (“*Migration Regulations*”). Regulation 1.03 provides that the phrase “*has the same meaning as in section 97 of the Act*”. Thereafter the phrase is employed in Regulations 2.41 and 5.15. It is also employed in Schedule 4. Within that Schedule Public Interest Criterion 4020 provides as follows:

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- (a) the application for the visa; or
- (b) a visa that the applicant held in the period of 12 months before the application was made.

Reference should also be made to Criterion 4020(2) which provides as follows:

(2) The Minister is satisfied that during the period:

- (a) starting 3 years before the application was made; and
- (b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

27 27 For present purposes the phrase “*bogus document*” assumes relevance because a delegate of the Minister refused to grant the Appellant a Skilled (Residence) (Class VB) visa because she was not satisfied that the Appellant met Public Interest Criterion 4020 for the purposes of cl 885.224 of Schedule 2 to the *Migration Regulations*.

28 28 The document in the present proceeding which the Migration Review Tribunal concluded was a “*bogus document*” was an IELTS Test Report Form in respect to the Appellant’s proficiency in English. The test results as recorded in the form of a document provided by the now-Appellant and upon which she relied in support of her visa application, as compared to those results obtained by the Department when it accessed the “*on-line*” records of those who conducted the test were as follows:

	Results as provided	On-line record
Listening	7.0	4.5
Reading	7.0	4.0
Writing	7.5	4.5
Speaking	7.0	4.0

29 29 Before the Tribunal the now-Appellant claimed that she had provided the test results which recorded the significantly higher test results in “*good faith*” and:

- • stated that there had been no response to requests made by her of those who conducted the tests to produce records of the test results. She submitted that the Tribunal should await a response to the requests made by the Appellant or that “*the Tribunal communicate with IELTS and obtain the accurate results shown on their records...*”; and
- • submitted that there was insufficient evidence upon which the Tribunal could “*reasonably suspect*” that the document fell within the definition in s 97.

No challenge is made to the Tribunal decision not to, in effect, adjourn its hearing to await a response to the Appellant’s requests for information. The Tribunal decided not to “*obtain further evidence*”. In expressing its state of “*satisfaction*”, the Tribunal further concluded:

[22] ... Having regard to the results of that test shown on the IELTS verification system, the Tribunal reasonably suspects that the test report provided by the applicant with the application was a bogus document either because it purports to have been, but was not, issued in respect of the applicant, or because it is counterfeit or has been altered by a person who does not have authority to do so. The Tribunal finds that there is evidence that the applicant had given, or caused to be given, to the Minister or an officer, a bogus document and such document was given in relation to the application for the visa (for the purpose of meeting the competent English requirement in cl. 885.213). The Tribunal finds that the applicant does not meet PIC 4020(1).

30 30 An application seeking judicial review of the Tribunal’s decision by the Federal Circuit Court of Australia was dismissed: *Patel v Minister for Immigration & Border Protection* [2014] FCCA 2059.

31 31 The Appellant now appeals to this Court. Leave should be granted to amend the *Notice of Appeal* as first filed on 2 October 2014. But the appeal to this Court should be dismissed with costs.

Purposely untrue – an element of fraud or deception

32 32 When considering *Public Interest Criterion 4020* and the definition of a “*bogus document*”, Buchanan J in *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42, (2014) 220 FCR 169 at 177-178 concluded:

[33] In my view, it should be accepted that an element of fraud or deception is necessary in order to attract the operation of PIC 4020. To take the example of bogus documents, a counterfeit document is not produced accidentally. Similarly, to charge that a statement is false is not to say only that it is wrong. The accusation potentially imports some element of knowledge or intention on somebody’s part, and in my view does so in the present context.

A little later, his Honour further observed:

[49] For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision: (2014) 220 FCR at 179 to 180.

Allsop CJ and Rangiah J agreed with Buchanan J. This decision has since been subsequently applied by Barker J in *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1276 at [54] to [56].

The test results

33 33 The primary submission advanced on behalf of the Appellant, albeit variously expressed, was that it did not follow from the fact that test results provided by the Appellant were false that they had been deliberately falsified.

34 34 Counsel on behalf of the Appellant:

- • did not seek to challenge the integrity of the manner in which test results were recorded on line and accepted as reliable the test results as recorded “on-line”;

and accepted that:

- • but for the test results as recorded in the form submitted by the Appellant she would not have satisfied the necessary requirement as to English proficiency for the purposes of her visa application.

No challenge was made to the interpretation given to the expression “*bogus document*” as set forth by the Full Court in *Trivedi* nor to the proposition that “*the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application*”. But that left open for consideration, in the submission of the Appellant, the possibility that:

- the test results as provided – albeit factually incorrect – were not “*deliberately falsified*”. The factually incorrect test results could, in her submission, have been the product of an honest mistake in transcription. A further possibility, presumably, was the prospect that the form of the document as provided by the Appellant was in precisely the same written form as it may have been provided to her by those conducting the test. If so, any error lay at the feet of those who issued the original form and not at the feet of the Appellant.

35 35 In the absence of any challenge to the integrity of the test results as recorded “*on-line*”, such information as was available to the delegate and the Tribunal, it is respectfully observed, is readily susceptible to a conclusion that the form of written document provided by the Appellant stated test results which had been deliberately changed. Such a conclusion could well have been supported by reference to the fact that each of the four test results bore no correlation to the correct results and that the four results as provided made possible the grant of the visa as sought by the Appellant. And such information as was available to the delegate and the Tribunal was also readily susceptible to a conclusion that it was the Appellant who was to bear responsibility for those changes.

36 36 The difficulty that the argument advanced on behalf of the Appellant confronts is that the Tribunal explained the basis for its reasonable suspicion. In summary form, the Tribunal reasoned that:

- the on-line verification system in respect to test results provided a TRF number unique to each person undertaking a test;
- the Appellant had been provided with a copy of the two documents recording different test results – one provided by IELTS and the other being that produced to the delegate – and given an opportunity to respond; and
- the two documents recorded the same TRF number and each had a photograph of the Appellant.

“*Having regard to the results of that test shown on the IELTS verification system*”, the Tribunal stated that it “*reasonably suspects that the test report provided by the applicant with the application was a bogus document either because it purports to have been, but was not, issued in respect of the applicant, or because it is counterfeit or has been altered by a person*”

who does not have authority to do so.” The existence of a means to challenge the test results was “not an admission that the recording of the scores may be incorrect.”

No error is exposed in the reasoning of the Tribunal. Given the limited facts presented to it by the now-Appellant, the state of reasonable satisfaction was a conclusion readily open to it. The Federal Circuit Court Judge was correct to reject this challenge to the reasoning of the Tribunal.

The securing of further information

The second real challenge to the decision-making process was to contend that the Tribunal should have itself secured further information in respect to the accuracy of the test results.

But this alternative contention necessarily has to confront the fact that the Tribunal has no unqualified or generally expressed duty to make inquiries; its function is to undertake a “review”. In expressing the confined circumstances in which a decision-maker should secure further information, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v SZLAI* [2009] HCA 39, (2009) 259 ALR 429 at 436 concluded:

[25] Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a “duty to inquire”, that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case ...

Although those observations were made in respect to the Refugee Review Tribunal, they apply with equal force to the functions entrusted to the Migration Review Tribunal. The Migration Review Tribunal is established by s 394 of the *Migration Act* and is entrusted by s 348 of that Act with the function to “review” such decisions as are specified by the Act.

On the facts of the present case, there was no readily available information to which any duty of inquiry could, in any event, attach. The written form of the test results as provided by the Appellant stated:

The validity of this IELTS Test Report Form can be verified by recognising organisations at <https://ielts.uct.ac.za>

That was the very “*web-site*” which was accessed by the Department and which produced the “*on-line*” record disclosing the discrepancy. An inquiry was made of the “*web-site*” which the document provided by the Appellant itself identified. The most that could possibly have been obtained as the result of any further inquiry was a written copy of any Test Report Form as provided to the Appellant. But such information as was available to the Tribunal was that such records as were kept by IELTS Australia were only kept for a period of two years. Given that the test as to English competence was undertaken in January 2009 and that the Tribunal hearing was conducted in September 2013 there was no real prospect that any inquiry would have resulted in any relevant information being made available.

41 41 These observations of their Honours in *SZIAI*, it should nevertheless be noted, are not to be construed as detracting from the fundamental task entrusted to the Migration Review Tribunal by the Commonwealth legislature to undertake a “*review*”. Well short of any “*duty to inquire*” and entirely separate from any consideration of improperly imposing an onus of proof upon a government agency participating in an administrative review, there may be circumstances in which a “*review*” as contemplated by the legislature may not be lawfully carried out if relevant and available materials are not placed before the Tribunal. There may, for example, be circumstances in which a claimant can show that a government agency has documents or other information centrally relevant to the proper resolution of the potential claims which are – for whatever reason – not being made available to the Tribunal. A failure on the part of a government agency to make such materials available to a reviewing authority may be tantamount to a failure to comply with the “*old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects*”: *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342 per Griffith CJ. A “*review*” may, for example, require that an administrative tribunal need have before it not only such materials as were before the delegate whose decision is under “*review*”, but all such other relevant material that was available to the delegate. A government agency cannot, by way of example, artificially circumscribe the ambit of a proper “*review*” by confining the ambit of those materials in fact before a decision-maker to the exclusion of other readily available material. Such an obligation imposed upon a government agency, perhaps, goes a little further than the duty already imposed upon the Secretary to the Department by s 352(4) of the *Migration Act*, which provides as follows:

The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision.

In the absence of any reason to question the position, the Tribunal may proceed upon an “*assumption*” that the Secretary has provided all such information: *Khant v Minister for Immigration and Citizenship* [2009] FCA 1247 at [74], (2009) 112 ALD 241 at 256. In an appropriate case the Tribunal may seek the provision to it of further information, be it further information which the Secretary “*considered ... to be relevant*” or otherwise. The view formed by the Secretary should not confine the freedom of the Tribunal to request such further information as may be available and which the Tribunal itself “*considers to be relevant*”.

42 42 By reason of the different duties imposed upon a Commonwealth agency as opposed to those imposed upon a claimant, it may be that a failure on the part of a claimant to make available all relevant and available material in his own possession may attract different considerations.

43 43 In the present appeal, the reliability of the test results relied upon by the Appellant were of obvious relevance to the case being advanced.

44 44 But the argument on behalf of the Appellant fails. The delegate of the Minister and the Tribunal had before them two versions of the test results – one obtained as a result of on-line searches undertaken by officers within the Department; and one supplied by the Appellant. Other than securing whatever available records remained by those who had conducted the tests, there was no suggestion of there being any other relevant material for the Tribunal to consider. There was an obvious conflict. The conflict was brought to the attention of the Appellant and she was given an opportunity to respond. She has been afforded procedural fairness to respond to that material upon which the Tribunal conducted its “*review*”.

45 45 It is not every case in which there is a conflict in evidence that requires an independent decision-maker to undertake its own inquiries or secure the provision of further information which is not presently available to either the claimant or the government agency. Indeed, such cases it may readily be expected are the exception rather than the rule. Nor can a duty to secure further information be transferred by a claimant to an independent decision-maker simply by a claimant providing information that conflicts with the information available to a government agency. And that is the case even where a claimant has attempted, unsuccessfully, to obtain further information.

46 In all such cases the duty of the independent decision-maker is to undertake a
47 review on such material as is available. That is what the Migration Review Tribunal did in
48 the present case. It was not required to do more.

CONCLUSIONS

47 It is thus concluded that the appeal should be dismissed with costs.

48 It necessarily follows that the terms of Public Interest Criterion 4020(2) may
49 impede both the Appellant and each member of her family unit from making any further
50 application for a period of three years.

49 The orders which it is respectfully concluded should be made are as follows:

1. Leave is granted to amend the *Notice of Appeal* in accordance with the form of the
 Amended Notice of Appeal dated 18 February 2015.
2. The appeal is dismissed.
3. The Appellant is to pay the costs of the First Respondent.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 3 March 2015